Puncakdana Sdn Bhd v Tribunal for Housebuyers Claims and another application

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R1–25–53 OF 2003 AND NO R1–25–58 OF 2003
MD RAUS J
4 SEPTEMBER 2003

Arbitration *— Jurisdiction — Retrospective jurisdiction — Breaches occurred before establishment of tribunal — Whether tribunal endowed with jurisdiction to hear and adjudicate over breaches*

Statutory Interpretation *— Construction of statutes — Purposive approach — Retrospective effect — Whether statute had retrospective criminal effect — Whether purposive approach to interpretation could give statute retrospective criminal effect — Federal Constitution art 7*

Under the Housing Developers (Control and Licensing) Act 1996 ('the Principal Act') the only avenue for redress available to house buyers against housing developers was the civil courts. Pursuant to amendments to the Principal Act brought into force by the Housing Developers (Control and Licensing) Amendment Act 2002 ('the Amendment Act') with effect from 1 December 2002, a Tribunal for Housebuyers Claims ('the Tribunal') was established with the jurisdiction to hear and adjudicate disputes between house buyers and housing developers. Since the establishment of the Tribunal, up to 3 July 2003, some 2,209 cases had been filed, of which some 438 cases had been disposed of, involving awards of compensation of some RM2.4m. All these disputes arose from sale and purchase agreements signed before 1 December 2002, ie the date of the establishment of the Tribunal and the date of the coming into effect of the relevant amendments to the Principal Act. In these applications, the applicant housing developers sought to quash awards of the Tribunal in favour of certain house buyers. The common question raised in these applications was whether the Tribunal had jurisdiction to hear and adjudicate cases where the sale and purchase agreement between the parties had been entered into before 1 December 2002. The thrust of the applicant's submission was that to construe the relevant amendments to the Act retrospectively would affect the substantive rights of the applicants. This was because s 16AD of the Amendment Act made non-compliance with an award of the Tribunal a criminal offence. The respondents argued, inter alia, that s 16N(2) of the Amendment Act clearly indicated that the provisions were intended to operate retrospectively.

Held, allowing the applications and quashing the awards with no order as to costs:

(1) Section 16N of the Amendment Act did not deal with the question of retrospective application. It was simply a section

which served to limit the jurisdiction of the Tribunal, where it otherwise had jurisdiction by virtue of s 16M of the Amendment Act. Thus, s 16N of the Amendment Act could not be read to confer retrospective jurisdiction on the Tribunal or to enlarge the jurisdiction of the Tribunal (see p 15A–B). A

(2) Where Parliament had specifically addressed the question of retrospective application elsewhere in the same amendments, the absence of a clear indication of retrospective application made it obvious that Parliament did not intend for that provision to operate retrospectively. Section 32(2) of the Amendment Act clearly provided for retrospective effect of the benefits of the new s 22C of the Principal Act, inserted by s 32(1) of the Amendment Act. Thus, if Parliament had intended for the Tribunal to have retrospective jurisdiction over sale and purchase agreements entered into before the coming into force of the Amendment Act, Parliament would have said so in clear words, in the same manner as it did in s 32 of the Amendment Act (see pp 15B–F, I–16A). B C D

(3) The relevant provisions ought not to be interpreted to operate retrospectively because of the existence of provisions which made non-compliance with an award of the Tribunal a criminal offence. The retrospective operation of criminal law was prohibited under art 7 of the Federal Constitution. At the time of entering into the sale and purchase agreements, these agreements only had civil consequences. Section 16N clearly exposed the applicants to criminal liability. This would, without doubt, affect their substantive rights if the section was construed retrospectively (see p 16A–F). E F

(4) Under s 16AD, only the act of non-compliance with an award of the Tribunal attracted criminal liability, not the alleged breach of the sale and purchase agreement itself. However, the award was but an extension of the breach. The breaches in these applications occurred before the establishment of the Tribunal. If Parliament had intended for the provisions to have retrospective application, Parliament would have had to expressly and clearly have said so (see p 16F–G). G

(5) There was no clear indication for a retrospective application of the provisions establishing the Tribunal. As such, no rule of statutory interpretation, including the purposive approach, could be of any assistance to give these provisions a retrospective application. The Tribunal had no jurisdiction to hear and adjudicate cases where the sale and purchase agreements were entered into before the date of the establishment of the Tribunal and the date of the coming into force of the Amendment Act (see p 17A–B); *Sim Seoh Beng & Anor v Koperasi Tuan Muda Sungai Ara Bhd* [1995] 1 MLJ 292 (CA) followed. H I

[Bahasa Malaysia summary

Di bawah Akta Pemaju-Pemaju Perumahan (Kawalan dan Pelesenan) 1996 ('Akta Prinsipal tersebut') satu-satunya cara bagi seseorang pembeli rumah menuntut ganti rugi daripada seseorang pemaju perumahan adalah menerusi tindakan di mahkamah sivil. Dengan pindaan yang dibuat kepada Akta Prinsipal tersebut di bawah Akta Pindaan Pemaju-Pemaju Perumahan (Kawalan dan Pelesenan) 2002 ('Akta Pindaan tersebut') dan berkuatkuasa mulai 1 Disember 2002, sebuah Tribunal Tuntutan Pembeli Rumah ('Tribunal tersebut') telah didirikan dengan bidang kuasa untuk mendengar dan menyelesaikan pertikaian di antara pembeli rumah dan pemaju perumahan. Sejak penubuhan Tribunal tersebut, sehingga 3 Julai 2003, hampir 2,209 kes telah difailkan, hampir 438 daripadanya telah diselesaikan, melibatkan award pampasan hampir RM2.4j. Kesemua pertikaian-pertikaian tersebut wujud daripada perjanjian jualbeli yang ditandatangani sebelum 1 Disember 2002, iaitu tarikh penubuhan Tribunal tersebut dan tarikh berkuatkuasaan pindaan relevan kepada Akta Prinsipal tersebut. Dalam permohonan-permohonan ini, pemaju perumahan memohon agar award daripada Tribunal tersebut memihak kepada beberapa orang pembeli rumah, diketepikan. Soalan undang-undang yang biasanya wujud dalam permohonan-permohonan ini adalah sama ada Tribunal mempunyai bidang kuasa mendengar dan menyelesaikan kes di mana perjanjian jualbeli di antara itu pihak-pihak tersebut telah ditandatangani sebelum 1 Disember 2002. Pemohon berhujah bahawa suatu tafsiran Akta Pindaan relevan secara retrospektif akan menjejaskan hak substantif pemohon. Ini adalah kerana s 16AD Akta Pindaan menjadikan ketidakpatuhan kepada sesuatu award Tribunal tersebut suatu kesalahan jenayah. Responden berhujah, antara lain, bahawa s 16N(2) Akta Pindaan dengan jelas menunjukkan bahawa peruntukan-peruntukan tersebut berfungsi secara kebelakangan.

Diputuskan, membenarkan permohonan tersebut dan mengenepikan award-award tersebut tanpa perintah untuk kos:

(1) Seksyen 16N Akta Pindaan tidak menyentuh persoalan kebelakangan. Ia semata-mata suatu seksyen yang bertindak menghadkan bidang kuasa Tribunal tersebut di mana ia sebaliknya mempunyai bidang kuasa di bawah s 16M Akta Pindaan tersebut. Jadi s 16N tidak dapat menjadi asas memberikan bidang kuasa kebelakangan kepada Tribunal tersebut atau bagi meluaskan bidang kuasa Tribunal tersebut (lihat ms 15A–B).

(2) Di mana Parlimen secara khusus menumpu perhatiannya kepada persoalan kebelakangan ke tempat lain dalam pindaan yang sama, maka ketidakhadiran tanda kebelakangan jelas menunjukkan bahawa Parlimen tidak bercadang untuk peruntukan tersebut bertindak secara kebelakangan. Seksyen 32(2) Akta Pindaan

tersebut jelas memperuntukkan kesan kebelakangan dari faedah peruntukan baru s 22C Akta Prinsipal, yang dimasukkan oleh s 32(1) Akta Pindaan tersebut. Oleh yang demikian, jika Parlimen berhasrat Tribunal tersebut diberikan bidang kuasa kebelakangan meliputi perjanjian jualbeli yang dimasuki sebelum berkuatkuasanya Akta Pindaan tersebut, maka Parlimen akan mengatakan sedemikian dengan perkataan-perkataan yang jelas, sepertimana dinyatakannya dalam s 32 Akta Pindaan tersebut (lihat ms 15B–F, I–16A).

(3) Peruntukan-peruntukan relevan tersebut tidak patut ditafsirkan supaya bertindak secara kebelakangan memandangkan kehadiran peruntukan-peruntukan yang menjadikan ketidakpatuhan suatu award Tribunal tersebut suatu kesalahan jenayah. Suatu pelaksanaan kebelakangan undang-undang jenayah adalah dilarang di bawah perkara 7 Perlembagaan Persekutuan. Pada masa perjanjian jualbeli itu ditandatangani, perjanjian-perjanjian tersebut hanya membawa akibat sivil. Seksyen 16N dengan jelas mendedahkan pemohon kepada liabiliti jenayah. Ini akan, tanpa sebarang keraguan, menjejaskan hak substantif mereka jika seksyen itu ditafsirkan secara kebelakangan (lihat ms 16A–F).

(4) Di bawah s 16AD, hanya tindakan ketidakpatuhan dengan sesuatu award Tribunal tersebut akan membawa kepada liabiliti jenayah, bukan semata-semata kemungkiran syarat perjanjian jualbeli yang dikatakan itu sendiri. Walau bagaimanapun, award tersebut sekadar suatu sambungan kepada kemungkiran tersebut. Kemungkiran-kemungkiran dalam permohonan-permohonan ini berlaku sebelum penubuhan Tribunal tersebut. Sekiranya Parlimen berhasrat supaya peruntukan-peruntukan tersebut mempunyai kesan kebelakangan, maka Parlimen perlu mengatakan sedemikian dengan nyata dan jelas (lihat ms 16F–G).

(5) Tiada sebarang tanda yang jelas untuk satu permohonan kebelakangan terhadap peruntukan-peruntukan yang menubuhkan Tribunal tersebut. Oleh yang sedemikian, tiada rukun tafsiran statutori, termasuklah pendekatan yang menitikberatkan tujuan, dapat membantu untuk memberikan peruntukan-peruntukan tersebut kesan kebelakangan. Tribunal tersebut tidak mempunyai bidang kuasa mendengar dan menyelesaikan kes di mana perjanjian jualbeli telah ditandatangani sebelum tarikh penubuhan Tribunal tersebut dan tarikh penguatkuasaan Akta Pindaan tersebut (lihat ms 17A–B); *Sim Seoh Beng & Anor v Koperasi Tuan Muda Sungai Ara Bhd* [1995] 1 MLJ 292 diikut.]

Notes

For cases on the purposive approach in statutory enterpretation, see 11 Mallal's Digest (4th Ed, 2002 Reissue) paras 1832–1860.

Cases referred to

Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 MLJ 292 (folld)

Legislation referred to

Housing Development (Control and Licensing) Act 1996
Housing Developers (Control and Licensing) (Amendment) Act 2002 s 16AD, 16M, 16N(2), 22C, 32(2), Part VI

Sree Harry (*Sri Ram & Co*) for the applicant in Application for Judicial Review No R1–25–53 of 2003.

Umi Kalthum bte Abdul Majid (*Rozlinda Yahya* with her) (Senior Federal Counsel and Federal Counsel, Attorney General's Chambers) for the first respondent in Application for Judicial Review No R1–25–53 of 2003.

KL Wong (*KY Soo* with him) (*KL Wong*) for the 2nd to 9th, 11th, 12th, 14th, 15th, 16th, 19th to 21st, 23rd, 26th, 27th and 32nd respondents in Application for Judicial Review No R1–25–53 of 2003.

Viola De Cruz (*VL De Cruz & Co*) for the 10th, 17th, 23rd, 24th, 25th, 31st, 33rd, 36th, 37th, 40th, 49th to 51st respondents in Application for Judicial Review No R1–25–53 of 2003.

Mohd Noh bin Nasira (*Nasira Aziz & Co*) for the 34th, 35th, 38th, 41st, 44th, 45th, 47th and 48th respondents in Application for Judicial Review No R1–25–53 of 2003.

Lambert Rasaratnam (*Sean Yeow* with him) (*Lee Hishammuddin*) for the applicant in Application for Judicial Review No R1–25–58 of 2003.

Umi Kalthum bte Abdul Majid (*Rozlinda Yahya* with her) (Senior Federal Counsel and Federal Counsel, Attorney General's Chambers) for the second respondent in Application for Judicial Review No R1–25–58 of 2003.

Md Raus J: These two applications, R1–25–58–2003 and R1–25–53–2003, with the agreement of all parties were heard together. Both applicants are licensed housing developers. In their applications for an order of certiorari to quash the awards of the Tribunal for Homebuyers Claims ('the Tribunal') the applicants raised a common legal issue, that is whether or not the Tribunal has the jurisdiction to hear and adjudicate on cases where the sale and purchase agreement was entered before 1 December 2002.

The Tribunal was established by the amendments made to the Housing Development (Control and Licensing) Act 1996 ('the Principal Act') vide the Housing Developers (Control and Licensing) (Amendment) Act 2002 ('the Amendment Act'). The Amendment Act was assented to on 23 January 2002 and subsequently was brought into force on 1 December 2002.

Part VI of the Amendment Act established the Tribunal. Section 16M has set out the jurisdiction of the Tribunal which provide as follows:

(1) Subject to sections 16N and 16O, the Tribunal shall have the jurisdiction to determine a claim lodged under section 16L, where the total amount

in respect of which an award of the Tribunal is sought does not exceed twenty-five thousand ringgit. A

(2) Subject to subsection (1), respondent to a claim may raise a debt or liquidated demand as —

(a) a defense; or
(b) a counterclaim. B

(3) Where a respondent raises a debt or liquidated demand under subsection (2) and the debt or demand is proved the Tribunal shall —

(a) give effect to the defense; or
(b) hear and determine the counterclaim notwithstanding that the original claim is withdrawn, abandoned or struck out.

(4) Any claim lodged with the Tribunal may include loss or damage of a consequential nature. C

With the establishment of the Tribunal, the homebuyers now have an additional avenue to seek redress against housing developers. Before this, their only redress was to file their claims with the civil courts. Since the establishment of the Tribunal, according to a report, as of 3 July 2003, D 2,209 cases had been filed before the Tribunal, out of which 438 cases have been disposed off. The Tribunal has already awarded RM2,396,537.73 compensation to the homebuyers. All of these cases, were in respect of cases arising from the sale and purchase agreements signed before 1 December 2002 that is, before the establishment of the Tribunal.

In these two applications, the sale and purchase agreements between E the applicants and respondents homebuyers had also been signed before the establishment of the Tribunal. It is the applicants' submissions that the Tribunal has no jurisdiction to hear their disputes with the respondents home buyers because Part VI of the Amendment Act, which established the Tribunal, does not operate retrospectively. The respondents, on the other F hand, have submitted that the Tribunal has the jurisdiction. According to them, s 16N clearly gives the Tribunal the jurisdiction to hear their claims eventhough the sale and purchase agreements were entered before the establishment of the Tribunal.

The trust of the applicants' submissions is that, Part VI of the G Amendment Act, which established the Tribunal with effect as at 1 December 2002, if construed retrospectively would affect their substantive rights. This is because s 16AD of the Amendment Act, make non- compliance with an award of the Tribunal a criminal offence.

The respondents in reply, submitted that, the clear words of Parliament indicating that Part VI of the Amendment Act is to operate retrospectively H is found in s 16N(2) which reads as follows:

(2) The jurisdiction of the Tribunal shall be limited to a claim that is based on a cause of action arising from the sale and purchase agreement entered into between the homebuyer and the licensed housing developer which is brought by a homebuyer not later that twelve months from the date of issuance of the certificate of fitness for occupation for the housing accommodation or the expiry date of the defects liability period as set out in his sale and purchase agreement. I

A With respect, I am unable to hold that s 16N(2) could be read to confer retrospective jurisdiction to the Tribunal. To me, s 16N does not deal with the question of retrospectivity. Section 16N is simply a section that serves to limit the jurisdiction of the Tribunal where it has jurisdiction by virtue of s 16M. This is evident from the heading of the section — 'Limitation of jurisdiction'. This is also made clear in the body of s 16N(2), which B provides:

> This jurisdiction of the Tribunal shall be limited to a claim.

Thus, s 16N could not therefore, be read to confer retrospective jurisdiction on the Tribunal or to enlarge the jurisdiction of the Tribunal. If it is true C that Parliament intended the Tribunal to have retrospective jurisdiction over sale and purchase agreements entered before the appointed date of coming into force of the Amendment Act, it would have said so in clear words in the same manner that Parliament did, in s 32 of the Amendment Act. Section 32 of the Amendment Act inserted a few sections to the Principle Act. One of the sections inserted is s 22C which reads as follows:

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> Notwithstanding anything contained in any written law, a homebuyer as defined in section 16A shall be entitled on his own volition and in his own name to initiate, commence, institute and maintain in any court or tribunal any action, suit or proceeding against a housing developer or any other person in respect of any matter arising out of the sale and purchase agreement entered into between the purchaser and that housing developer unless a contrary E intention is expressed in any agreement, assignment or charge between the homebuyer and his financier in which case the prior written consent of his financier must first be obtained before he exercises any of his rights under this section.

In relation to this new s 22C, s 32(2) of the Amendment Act provides as F follows:

> Every agreement, assignment or charge lawfully entered into between purchaser and his financier *before the appointed date* shall be subjected to, and the parties shall be entitled to the benefits of the new section 22C of the Principal act as inserted into the Principal Act by subsection (1). (Emphasis added.)

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Section 22C above, essentially provides that a homebuyer may initiate an action in his own name, notwithstanding that he has assigned his rights under the sale and purchase agreements, unless a contrary intention is expressed in the assignment. Parliament, in sub-s 32(2) has provided in clear terms that the new s 22C is to apply retrospectively to assignments H entered before the appointed date of the Amendment Act. Thus, when Parliament had thought it fit to expressly state about the retrospective application of s 22C, then equally Parliament would have said so in clear words in the same manner to s 16N(2) if the Tribunal was to operate retrospectively. But there is no indication in s 16N(2) or other provisions of Part VI of the Amendment Act that Parliament intended the amendments I establishing the Tribunal to affect sale and purchase agreements entered into before 1 December 2002. In such absence, particularly where Parliament has had specifically addressed the question of retrospectivety

elsewhere in the same amendments, makes it very clear and obvious that Parliament does not intend to have Part VI of the Amendment Act to operate retrospectively.

Moreover, s 16N(2) could not be interpreted to operate retrospectively because of the existence of s 16AD which make non-compliance with the Award of the Tribunal a criminal offence. Section 16AD provides:

> (1) Any person who fails to comply with an award made by the Tribunal within the period specified therein commits an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years or to both.
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> (2) In the case of a continuing offence, the offender, shall, in addition to the penalties under subsection (1), be liable to a fine not exceeding one thousand ringgit for each day or part of a day during which the offence continues after conviction.

Section 16AD above, clearly exposed both applicants not only to civil liability but also to a criminal liability. This, without doubt affects their substantive rights if s 16N is to be construed to operate retrospectively. This is because at the time of the sale and purchase agreement was entered into, any breach of the agreement only had civil consequences. The applicants' total exposure for the alleged breach was only a civil liability in that if a monetary judgment was entered for liquidated ascertained damages for late delivery and if the applicants were unable to be satisfied with the said monetary judgment then the applicants are only open to the risk of the various mode of enforcement. Surely, the applicants do not envisage at the time of the sale and purchase agreement which they had entered into, could produce a result of a breach of the agreement that could give rise to a criminal offence being committed. In the circumstances, to permit the Tribunal to exercise its jurisdiction over the sale and purchase agreement entered into before 1 December 2002 is to allow retrospective criminal laws. This is prohibited by art 7 of the Federal Constitution.

No doubt, under s 16AD, it is only the act of non-compliance with an Award of the Tribunal that attracts a criminal liability and not the alleged breach itself. But, to me, the Award is an extension of the breach. What is relevant is the time of the breach and in these two applications the breaches occurred before the establishment of the Tribunal. Thus, if Parliament had intended that the Amendment Act is to have retrospective application in that Parliament intended housing developers to be criminally liable for its breaches which are not unlawful act at the time it was done, then Parliament would have to expressly and clearly said so. This was not done.

In *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292, the Court of Appeal laid down the applicable test as follows at p 297:

> In our judgment, the correct test to be applied to determine whether a written law is prospective or retrospective is to first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, prima facie the law must be construed as having prospective effect only, unless there is a clear indication in the enactment that it is in any event to have retrospectivity.

A Applying the above test, I am of the view that the amendments establishing the Tribunal if applied retrospectively would affect the substantive rights of both applicants. I also find that there is no clear indication in the Amendment Act for a retrospective application of Part VI which established the Tribunal. As such, no rule of statutory interpretation including the purposive approach can be of any assistance to give Part VI of the
B Amendment Act a retrospective application. Thus, my answer to the legal question posed in these two applications is that, the Tribunal has no jurisdiction to hear and adjudicate cases where the sale and purchase agreement was entered before 1 December 2002.

Accordingly, I allow both applications but with no order as to costs.

C *Applications allowed and awards quashed with no order as to costs.*

Reported by Sivapragasam Kumaran

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